

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS (Boston)

No. 1:23-cv-10511-WGY  
Vol. 2, Pages 95-172

UNITED STATES OF AMERICA, et al  
Plaintiffs

vs.

JETBLUE AIRWAYS CORPORATION,  
et al,  
Defendants

\*\*\*\*\*

For Bench Trial Before:  
Judge William G. Young

United States District Court  
District of Massachusetts (Boston)  
One Courthouse Way  
Boston, Massachusetts 02110  
Monday, November 27, 2023

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I N D E X

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1 (Proceedings, 11:31 a.m.)

2 THE CLERK: Court is back in session. You may be  
3 seated.

4 THE COURT: Counsel, you may continue.

5 MR. THORNBURGH: Thank you, your Honor.

6 THE COURT: You may commence.

7 MR. THORNBURGH: Thank you.

8 NICHOLAS HILL, (Resumed)

9 CROSS-EXAMINATION

10 BY MR. THORNBURGH:

11 Q. Good morning, Dr. Hill.

12 A. Hello, Mr. Thornburgh.

13 Q. Good to see you again.

14 A. Likewise.

15 Q. I hope your Thanksgiving was as relaxing as mine.

16 A. It was. Thank you.

17 Q. Dr. Hill, in your direct testimony just now you shared  
18 the results that you found when you applied your entry  
19 intensity model to your purported increased competition  
20 routes; correct?

21 A. Correct.

22 Q. And the results that you shared were purporting to look  
23 at fares in a market and how they were affected when either  
24 JetBlue or Spirit entered; correct?

25 A. Looking at the effects on a route, yes.

1 Q. But in that analysis and the results of that analysis  
2 that you shared, you weren't including all fares in your  
3 results; correct, sir?

4 A. That's correct.

5 Q. And so by only looking at rival fares you left out the  
6 fares offered by the airline that is entering a particular  
7 route or market; correct?

8 A. So correct on the left-hand side, yes.

9 Q. And you would agree, Dr. Hill, that Spirit typically  
10 enters markets or routes with fares that are lower than the  
11 prevailing marketwide average fares; correct?

12 A. I think that's fair.

13 Q. And so when you were evaluating Spirit entry and only  
14 looking at rivals' fares, that means that you are leaving  
15 out the low fares that Spirit offers when it enters a  
16 market; fair?

17 A. So Spirit's fares are not included, or JetBlue's, for  
18 that matter. Yes.

19 Q. Indeed, Dr. Hill, you've acknowledged that using your  
20 model to assess rivals' fares in the overlap markets where  
21 JetBlue and Spirit compete today would only provide a lower  
22 bound of harm that would occur as a result of this  
23 transaction; right?

24 A. So I think it's important to balance both the benefits  
25 and the harms, as I did on my slide. Yes.

1 Q. But just to make sure the record is clear, Dr. Hill, if  
2 you were to only look at rivals' fares in the overlap  
3 markets for JetBlue and Spirit today, it's your  
4 understanding that that would only provide a lower bound of  
5 harm that could occur as a result of this transaction;  
6 correct?

7 A. Yeah. You'd be missing the potential effect that would  
8 happen to Spirit passengers. Correct.

9 Q. Dr. Hill, you actually did use your entry intensity  
10 model to assess the impact that JetBlue and Spirit each have  
11 on all fares in a market; right?

12 A. That's correct.

13 Q. And examining each airline's impact on marketwide  
14 average fares is consistent with the testimony the Court has  
15 heard from Spirit's CEO about how Spirit measures the Spirit  
16 Effect; right?

17 A. I don't recall but I'll take -- yeah, that sounds  
18 right. Okay.

19 Q. You have no reason to disagree with me on that?

20 A. Yeah, no, I don't. I don't.

21 Q. And you also understand that JetBlue measures its  
22 impact in a market by looking at how marketwide average  
23 fares change when it enters a market; correct?

24 A. That's my general understanding, yes.

25 Q. Okay.

1 MR. THORNBURGH: So let's go ahead and look at  
2 figure 69 from Dr. Hill's report, if we could.

3 (On screen.)

4 Q. Dr. Hill, I believe this figure is either in your  
5 binder or will be passed out to you now. It will be Hill  
6 1006 Summary 3.

7 A. Which of these folders should I look at?

8 Q. I think the smaller one.

9 A. Exhibits and Demonstratives?

10 Q. Just one moment.

11 A. Oh, sorry. I could probably find it in my report if  
12 you want me to just go there.

13 THE COURT: Dr. Hill figure 69, right?

14 MR. THORNBURGH: Yes.

15 THE COURT: I have it.

16 THE WITNESS: I have it.

17 Q. Great. It appears we're the only ones who don't have  
18 it. Do you have it, Dr. Hill?

19 A. I do. I have it in my report. So, I see, yes.

20 Q. So, Dr. Hill, this is a figure that was in the report  
21 that you submitted as part of your evaluation of competitive  
22 effects for this case; right?

23 A. It was submitted in my report, correct, in the context  
24 of explaining, you know, I don't think all fares is  
25 appropriate, but I also ran it that way for full disclosure.

1 MR. THORNBURGH: Your Honor, plaintiffs request  
2 that Hill 1006 Summary 3, which is figure 69 from Dr. Hill's  
3 report, be admitted in evidence as Exhibit 881, I believe.

4 THE COURT: No objection?

5 MR. GELFAND: No objection.

6 THE COURT: The document, it will be admitted,  
7 Exhibit 881.

8 MR. THORNBURGH: Thank you, your Honor.

9 (Exhibit 881 received in evidence.)

10 Q. We've created a demonstrative that contains both figure  
11 69, Dr. Hill, as well as an additional analysis which will  
12 now be passed out to you as well. I'll wait until you have  
13 the demonstrative here.

14 (Handing.)

15 (On screen.)

16 Q. So let's start, Dr. Hill, if we could, with the figure  
17 on the left. So this is the figure 69 from your report. So  
18 this shows the results of your entry intensity model when  
19 you apply this model to all fares in a market based on  
20 whether JetBlue or Spirit enters; right?

21 A. Correct.

22 Q. So, in other words, unlike your focus on rival fares  
23 that you testified to this morning, figure 69 includes the  
24 entrants' low fares as well; right?

25 A. Correct.

1 Q. And so figure 69 shows that when JetBlue or Spirit  
2 enters a new market with relatively low intensity,  
3 below 0.25 on this figure, Spirit is about twice as  
4 effective as JetBlue at lowering marketwide average fares;  
5 correct?

6 A. That's true for market average wide because it has  
7 lower fares. Yes.

8 Q. And then focusing on the right bin above 0.5, Spirit is  
9 also more effective than JetBlue in that bin at lowering  
10 marketwide average fares as well; correct?

11 A. Did you say the second bin here?

12 Q. I'm sorry, Dr. Hill, the final bin where it says  
13 above 0.5 in figure 69.

14 A. Correct.

15 Q. And in the middle bin, which is titled between 0.25  
16 and .5, JetBlue and Spirit are about even; correct?

17 A. That's fair.

18 Q. Now, the figure on the right is something that we put  
19 together, Dr. Hill. It shows the breakdown of market  
20 quarters for which you calculate a net benefit in your  
21 purported increased competition routes. Dr. Hill, do you  
22 have any reason to dispute the results shown on the  
23 demonstrative in front of you?

24 MR. GELFAND: Your Honor, we object to this part  
25 of the exhibit because this analysis was not previously

1 disclosed to us.

2 THE COURT: Well, I'm going to allow him to  
3 examine it, but that question, I'm going to sustain the  
4 objection to that particular question. You may proceed.

5 MR. THORNBURGH: Let me try a different question  
6 if I could, your Honor.

7 Q. Dr. Hill, your entry intensity model and the results  
8 shown in figure 69, you apply those in your benefits  
9 calculation to market quarters. Is that accurate?

10 A. Can you say more of what you mean about market  
11 quarters? I mean, it takes the four quarters before and the  
12 four quarters after an entry event to estimate the effect of  
13 the entrant.

14 Q. Sure. And when you, Dr. Hill, apply your entry  
15 intensity model to your purported increased competition  
16 routes to calculate a total net benefit, you are applying  
17 this entry intensity model to individual markets; correct?

18 A. I apply it on a route-by-route basis, yes.

19 Q. It includes multiple quarters of a year, for example,  
20 four quarters, to figure out the total benefits that are  
21 associated with a particular market; correct?

22 A. I don't recall the details of whether I did an annual  
23 prediction or took four quarters and moved them up. But  
24 regardless, yeah, it's applied on an annual basis.

25 Q. Okay. Well, let me ask you this question: If we were

1 to take the entry intensity model results shown in figure 69  
2 and we applied these -- applied your entry intensity model  
3 to all fares in your purported increased competition routes,  
4 we would find that there would be a benefit not a -- excuse  
5 me, we would find there would be a harm, not a benefit to  
6 consumers in those markets; correct?

7 A. Yeah, I believe that would be true.

8 Q. Dr. Hill, you didn't apply your entry intensity model  
9 to markets where both JetBlue and Spirit provide nonstop  
10 service today; correct?

11 A. That's correct.

12 Q. You acknowledge that you designed your model to focus  
13 on the purported increased competition routes where Spirit  
14 provides nonstop service today but JetBlue is not present in  
15 a meaningful way; right?

16 A. I don't think that's quite fair. I mean, the model was  
17 set up to try to estimate the effect of Spirit and JetBlue  
18 on rivals' fares.

19 Q. Well, let's go ahead and take a look at your  
20 deposition, if we could, sir. If I could ask you to turn in  
21 your binder to your deposition, page 234.

22 MR. THORNBURGH: If we could put 234, Ms. O'Brien,  
23 and 235 on the screen, please.

24 (On screen.)

25 Q. So, Dr. Hill, let me know when you're there.



1 A. 234? I'm there.

2 Q. Yes, sir. So, Dr. Hill, I asked you on line --

3 A. Hold on. I apologize. This is a different page than I  
4 have. Oh, 234 or 235?

5 Q. 234, starting there. I asked you on line 15:

6 "QUESTION: Dr. Hill, would you agree your entry  
7 intensity model measures the net harm associated with this  
8 transaction?"

9 Your answer:

10 "ANSWER: No, it's not really set up for that."

11 My question was:

12 "QUESTION: Okay. What's it set up to do, in your  
13 opinion?"

14 And your answer was:

15 "ANSWER: It's really set up to look at the -- what I  
16 call the, I think, increased competition or the Spirit-only  
17 plus routes, routes where essentially today Spirit is  
18 operating" -- it says "put" -- "JetBlue is not present in a  
19 meaningful way and JetBlue will replace Spirit. You could  
20 also use it in the other direction if the transaction was  
21 going in the other direction, but for this transaction  
22 that's where I see its value."

23 Those are the questions I asked and those are the  
24 answers you gave; correct, Dr. Hill?

25 A. That's correct.

1 Q. So put another way, Dr. Hill, you designed a model that  
2 you acknowledge cannot be reliably used to assess harm in  
3 nonstop markets where both JetBlue and Spirit compete today;  
4 correct?

5 A. Yeah, I disagree with you. The way you're using  
6 "design" there is the source of my discomfort here. I mean,  
7 the model was set up to ask the question what's the effect  
8 on rivals' fares. And it's not able to answer the question  
9 of what's the effect on the entering carrier, or in this  
10 case exiting carrier, but it was designed to answer a  
11 question it can answer. And then for those other folks it's  
12 hard to -- neither Professor Gowrisankaran nor I have an  
13 answer to how do we account for the effect of them.

14 Because this is the example, your Honor, I was talking  
15 about earlier. If Spirit exits and a customer switches to  
16 JetBlue and they pay \$20 more for their fare, we don't know,  
17 given that they're getting a higher quality product, whether  
18 they lose between zero or \$20 in benefit. So you're  
19 absolutely right it can't be applied to estimate the total  
20 effect, and that's why I used Professor Gowrisankaran's  
21 estimates when I get to weighing harms and benefits.

22 Q. So just to make sure the record is clear, Dr. Hill, you  
23 agree your entry intensity model that you designed cannot be  
24 used reliably in the nonstop overlap markets where JetBlue  
25 and Spirit compete today; correct?

1 A. To look at focal carriers -- focal carriers' fares,  
2 yes.

3 Q. Dr. Hill, usually when you look at a transaction, when  
4 you're asked to evaluate a potential transaction, you look  
5 at head-to-head competition; correct?

6 A. That's fair.

7 Q. In fact, you have never before, as best you can recall,  
8 built a model for evaluating competitive effects for a  
9 horizontal merger such as this one that could not be applied  
10 to markets where the two merging parties compete; right?

11 A. That's fair.

12 Q. Dr. Hill, on direct examination you testified that you  
13 believe JetBlue is a more effective competitor than Spirit;  
14 right?

15 A. Correct.

16 Q. However, you would agree that JetBlue and Spirit can  
17 both be effective competitors in a market; right?

18 A. Yeah. I think my results show that they both are  
19 effective competitors.

20 Q. And you would agree, Dr. Hill, that consumers can  
21 benefit from both JetBlue and Spirit; right?

22 A. They can.

23 Q. And would you agree that some passengers prefer  
24 Spirit's low unbundled fare to the higher fares offered by  
25 JetBlue?

1 A. I think that's fair.

2 Q. Dr. Hill, it's your opinion that JetBlue offers more  
3 value to its consumers than Spirit; right?

4 A. I would say on average JetBlue offers more value than  
5 Spirit.

6 Q. And that's your basis for concluding that passengers  
7 traveling on Spirit today will be at least equally well off  
8 in the future flying on JetBlue instead?

9 A. I would say it slightly different. On the Spirit-only  
10 routes I would say that on average passengers will be at  
11 least as well off.

12 Q. That's true, what you just said, even though you  
13 acknowledge those customers flying Spirit today would have  
14 to pay on average higher fares by flying on JetBlue in the  
15 future; correct?

16 A. Yeah, there are some customers who may benefit because  
17 they get JetBlue when they didn't have it. And as you're  
18 saying, there may be some customers who really wanted Spirit  
19 and either aren't able to get it or have to pay more for it.

20 Q. Dr. Hill, if we can go ahead and put up slide 12 from  
21 your direct presentation from a few minutes ago. On this  
22 slide -- I'll wait for it to get up on the screen here.

23 (On screen.)

24 Q. This is a slide, Dr. Hill, where you discuss some of  
25 the features of the JetBlue product; right?

1 A. Correct.

2 Q. This is based off of a chart that you included in your  
3 report; right?

4 A. That is correct.

5 Q. But the chart in your report also included Spirit;  
6 correct?

7 A. Correct.

8 Q. Okay.

9 MR. THORNBURGH: I have another demonstrative for  
10 this next line of questioning. If we could please hand out  
11 Hill Demonstrative B, and we'll hand out copies to counsel  
12 and to the witness as well.

13 (Handing.)

14 THE WITNESS: Thank you.

15 Q. So, Dr. Hill, on the right side of this slide is the  
16 figure 27 from your report. Do you recognize it, sir?

17 A. I do.

18 Q. And so focusing just on the figure that's on the right,  
19 for the moment, Spirit does actually offer many of the  
20 products or services that are listed here where you put a  
21 red X; correct?

22 A. It does, but it doesn't offer them if they're free, for  
23 example. So that's -- this -- the one on the left doesn't  
24 have, for example, free -- oh, it does. Yeah. Yep.

25 Q. Okay. And so as you testified earlier to this morning,

1 Spirit offers seats on its flights with additional legroom,  
2 like exit-row seats and big front seats; right?

3 A. That's fair.

4 Q. And you were here to hear the testimony of  
5 Dr. Gowrisankaran that those seats go unsold on more than  
6 half of Spirit flights despite a relatively low incremental  
7 cost for consumers to purchase them; correct?

8 A. I don't recall that, but I have no reason to doubt it.

9 Q. Okay. Dr. Hill, you did not undertake any empirical  
10 analysis yourself to understand how much consumers value  
11 additional legroom; is that fair?

12 A. That's true.

13 Q. And the Court also heard testimony from  
14 Dr. Gowrisankaran about the low percentage of Spirit  
15 passengers that purchase Wi-Fi today. You did not  
16 empirically study how much consumers value Wi-Fi; correct?

17 A. I didn't study it, no.

18 THE COURT: And more to the point, you don't know  
19 of a way to quantify how much they value that?

20 THE WITNESS: That's fair. Your Honor, at an  
21 aggregate level I can see that I see customers choosing  
22 JetBlue more than Spirit when both are available, but I  
23 can't go into this chart and say legroom is worth this much.  
24 And, furthermore, I haven't studied it. My guess would be  
25 that different --

1 THE COURT: Well, guesses alert me right away.

2 THE WITNESS: Apologies. My inference would be  
3 that different consumers would have different preferences.  
4 I have not studied that.

5 THE COURT: Mr. Thornburgh, go right ahead.

6 MR. THORNBURGH: Thank you, your Honor. Before I  
7 continue, can I ask that the demonstrative be published to  
8 the gallery, please?

9 THE COURT: It may be.

10 MR. THORNBURGH: Thank you.

11 Q. Dr. Hill, I want to ask you about your response to the  
12 judge's question just now. You understand that  
13 Dr. Gowrisankaran, as part of his net harm analysis, did a  
14 sensitivity where he used the produced ticket data from all  
15 of the domestic carriers that included ancillary purchases  
16 of various services; correct?

17 A. Correct.

18 Q. And so he included, in the price that consumers pay,  
19 the consumers, if they bought priority boarding, or carry-on  
20 bags and all of those different types of services; right?

21 A. He included the things that can be bought, yes.

22 Q. And he produced a net harm model using those -- the  
23 features that consumers bought; correct?

24 A. I think it's the same model as he used on the DB1B  
25 data, but yes.

1 Q. Now, Dr. Hill, you did not run a sensitivity of your  
2 own entry intensity model accounting for these purchases of  
3 ancillary services or products that consumers -- that  
4 consumers may value; correct?

5 A. Right, correct.

6 Q. Okay. So just stepping back for a moment, Dr. Hill,  
7 you did not undertake any empirical analysis to understand  
8 how much consumers value any of the individual features that  
9 are listed in figure 27 from your report; correct, sir?

10 A. That's correct.

11 Q. And you would agree, Dr. Hill, that some of the  
12 services listed here, some consumers may have no value for  
13 that particular service or product; correct?

14 A. That's certainly possible, yes.

15 Q. So, for example, you don't know what -- to what degree  
16 a single parent traveling with children on Spirit today  
17 might prefer to, say, pack snacks from home rather than pay  
18 a higher fare to fly on JetBlue; right?

19 A. I did not analyze that issue.

20 Q. You similarly don't know whether such a person would  
21 place any value on a better JetBlue loyalty program;  
22 correct?

23 A. Correct.

24 Q. You don't know whether someone who chooses to fly  
25 Spirit today and declines to purchase any ancillary services



1 would place any value on JetBlue's, say, seat-back  
2 entertainment; correct?

3 A. That's correct.

4 Q. And you don't know whether someone who chooses to fly  
5 on Spirit today would find JetBlue's increased relevance as  
6 a result of this merger worth paying a higher fare; correct?

7 A. Yeah, I don't think I analyzed increased relevance.

8 Q. And you don't know whether someone flying Spirit today  
9 to visit family in Bogota, Colombia would place any value on  
10 a better JetBlue credit card partnership; right?

11 A. I definitely didn't get down to that detail, no.

12 Q. Now, Dr. Hill, there may be airline product attributes  
13 that are not found on your figure 27 or on your slide from  
14 this morning that consumers may value; right?

15 A. That's possible, yes.

16 Q. I think you probably would agree with me, Dr. Hill,  
17 that most airline passengers value getting to their  
18 destination on time; correct?

19 A. Yeah, in general.

20 Q. You didn't study, though, how JetBlue and Spirit  
21 compare in terms of on-time performance; correct?

22 A. I did not.

23 Q. You also didn't study how JetBlue and Spirit compare in  
24 terms of canceled flights; correct?

25 A. Correct.

1 THE COURT: Well, let me just ask counsel a  
2 question. The government's rested here, and I've got a  
3 mountain of information, but is there information in the  
4 record as to that as of now?

5 MR. THORNBURGH: I believe there may be  
6 ordinary-course documents, your Honor, in the record that  
7 speak to this. I was just about to ask the witness a  
8 question based on a publicly available Department of  
9 Transportation document. You know, we'd certainly be  
10 welcome to put additional evidence into the record on this  
11 issue.

12 THE COURT: I'm not asking for it, I just wondered  
13 what the basis of your questions were. All right. You  
14 proceed.

15 Q. So, Dr. Hill, would it surprise you to learn that  
16 Spirit actually performed better than JetBlue on both  
17 on-time performance and cancellation metrics in data  
18 recently reported by the Department of Transportation?

19 MR. GELFAND: Your Honor, I have a different  
20 objection. It's beyond the scope of my examination.

21 THE COURT: It is and, therefore, this is not a  
22 proper way to frame the question, but that doesn't preclude  
23 you from getting the information. Go ahead. The objection  
24 is sustained.

25 Q. Dr. Hill, let me ask you this question: If you learned

1 that Spirit had better performance metrics with regards to  
2 on-time performance and cancellation, would that affect your  
3 opinion as to whether JetBlue is a -- provides more value to  
4 its customers?

5 A. I'd definitely have to analyze them. I mean, they fly  
6 different route networks. I'd have to understand what's  
7 really being included in that information. I --

8 Q. But it's not -- oh, I'm sorry.

9 A. Sorry, just I haven't studied that.

10 Q. Thank you.

11 MR. THORNBURGH: We can now go to slide 15 of  
12 Dr. Hill's direct testimony, please.

13 A. Mr. Thornburgh, something just fell out of your pocket.

14 Q. Oh, some lint. Thanks for the tip.

15 A. Slide 15, did you say?

16 Q. Yes, sir.

17 (On screen.)

18 Q. Okay. So, Dr. Hill, this is the slide that you  
19 testified to this morning as your basis for concluding that  
20 JetBlue provides more value than Spirit to customers; right?

21 A. It's one of the bases, yes.

22 Q. Okay. So, and what this is purporting to show is the  
23 share of passengers that fly JetBlue versus Spirit on  
24 nonstop overlap routes; correct?

25 A. On the left-hand side, yes.

1 Q. And then on the right-hand side is a more narrow set of  
2 nonstop overlaps where the -- that meet the presumption  
3 under merger guidelines; correct?

4 A. Correct.

5 Q. So let's break this down a little bit. So, first,  
6 Dr. Hill, you would agree that an airlines' share in a  
7 particular market will depend in part on how much capacity  
8 or planes an airline chooses to put on that particular  
9 route; right?

10 A. It can, but their capacity will also depend upon their  
11 appeal.

12 Q. So -- fair enough. But in other words, Dr. Hill, it's  
13 not just the competitive conditions in a particular route or  
14 market that affect how much capacity an airline chooses to  
15 deploy; correct?

16 A. There may be other factors that affect their total  
17 capacity decision, yeah.

18 Q. And you don't account for those other factors in  
19 figure 36 here; correct?

20 A. Correct.

21 Q. Second, Dr. Hill, you were here for the testimony of  
22 Mr. Clark from JetBlue; right?

23 A. I was here for some, and some I watched remotely, yes.

24 Q. Mr. Clark testified that on some routes today,  
25 particularly routes between Boston and other airlines' hubs,

1 JetBlue serves a higher proportion of business customers  
2 whereas Spirit is more focused on leisure customers. Do you  
3 recall that testimony?

4 A. Yes.

5 Q. So, Dr. Hill, if JetBlue and Spirit are serving  
6 different types of customers on a particular route, what can  
7 you really conclude about how much consumers value a  
8 particular airline if they're not considering both options?

9 A. Well, so I'm not sure that they're not considering both  
10 options. So this is looking on average across all of these  
11 routes. And Professor Gowrisankaran looked at something  
12 similar when he looked at the percentage of routes on which  
13 each carrier was the largest. So I think this is  
14 informative, and combined with the information about  
15 quantity effects, I think it's a reasonable basis for saying  
16 that JetBlue is appealing to more customers than is Spirit.

17 Q. Dr. Hill, you acknowledge that on 14 of the 51 nonstop  
18 presumption markets that go into the calculation here on the  
19 right, it's actually Spirit that has a larger share than  
20 JetBlue; correct?

21 A. I don't recall the exact number but it's something like  
22 that, yes.

23 Q. So then would you agree that on those 14 routes Spirit  
24 is providing more value than JetBlue to customers?

25 A. You could make that. I think it would be an aggressive

1 inference. And my preference is to look across all of the  
2 routes, and that's why I presented this as average across  
3 all of those routes.

4 Q. Dr. Hill, at a minimum, doesn't the fact that Spirit  
5 has a higher market share than JetBlue on those 14 routes  
6 mean that you need to investigate further to understand  
7 whether Spirit customers are getting more value on those  
8 routes before concluding that on average all customers would  
9 be better off as a result of this merger?

10 A. Yeah, I mean, I don't really agree. Because we're  
11 looking on average, we're saying across the average of all  
12 these routes what's true. There may be a route where Spirit  
13 is more preferred than JetBlue. I'm not ruling that out.  
14 I'm just asking an average question. Take an average route  
15 on which they go head to head, who's more likely to have the  
16 higher market share.

17 Q. Let's take a look at figure 22 from your report, if we  
18 could. It's on page 34 of your report, Dr. Hill.

19 A. Sure.

20 Q. Are you there, Dr. Hill?

21 A. I am, sir.

22 (On screen.)

23 Q. You recognize this figure 22 as a figure that you  
24 included in your original report; correct?

25 A. I do.

1 Q. Okay. And on the left is passenger-based shares for  
2 domestic-ticketed passengers; right?

3 A. That's correct.

4 Q. And in that chart it's actually Spirit that has a  
5 higher share than JetBlue; correct?

6 A. Yes, correct, on the passenger-based side. That's  
7 right.

8 Q. And so doesn't this show that it's actually Spirit  
9 that's providing more value to customers than JetBlue?

10 A. I don't think so. I mean, I think a better way to get  
11 at this issue is to look at routes on which they both  
12 compete head to head, which do passengers choose more often.

13 Q. Dr. Hill, let's go back to slide 15 of your direct  
14 testimony, if we could.

15 (On screen.)

16 Q. Dr. Hill, you agree that about 30 percent of JetBlue's  
17 passengers on routes where Spirit is present today purchase  
18 Blue Basic tickets; correct?

19 A. I think that number was redacted on my slide so I'm not  
20 going to commit to an exact number. But something in the  
21 vicinity, yes.

22 Q. Okay. Fair enough. Well, we prepared a demonstrative.

23 MR. THORNBURGH: If we can pass this Hill  
24 Demonstrative C out quickly here.

25 (Hanging.)

1 Q. So, Dr. Hill, we took the amount of passengers that fly  
2 Blue Basic in routes that overlap with Spirit and we just  
3 did some math to calculate what the share of -- what  
4 JetBlue's share would be in those markets if you just looked  
5 at the Blue Basic share. Do you see that on the screen in  
6 front of you?

7 MR. GELFAND: Your Honor, I'm going to make a  
8 similar objection to before. This is the first time we've  
9 seen this analysis, so I object to using calculations that  
10 we can't pressure-test.

11 MR. THORNBURGH: Your Honor, I'm not trying to get  
12 the underlying data into the record, I was just about to ask  
13 Dr. Hill if he has a reason to disagree with the figures  
14 shown on the screen.

15 THE COURT: He's just seen it. I've just seen it.  
16 So I have a problem with that question. But let me see what  
17 your assumptions are.

18 You're assuming that on overlap routes you've  
19 taken the number of passengers on JetBlue that have  
20 purchased Blue Basic, and then you've taken the number of  
21 Spirit passengers on that route and compared the two?

22 MR. THORNBURGH: That's correct, sir. That's just  
23 math to come up with the market-share calculations on the  
24 screen in front of you.

25 THE COURT: So the only thing that is math here is



1 the vertical axis to the left to figure out -- and the  
2 captions on each one -- to figure out the market share.

3 MR. THORNBURGH: For JetBlue, correct. The Spirit  
4 shares are unchanged from Dr. Hill's figure from this  
5 morning.

6 THE COURT: All right. On those assumptions, ask  
7 some questions.

8 MR. THORNBURGH: Thank you, your Honor.

9 Q. So, Dr. Hill, we see that if you only look at Blue  
10 Basic passengers, the share of customers buying Blue Basic  
11 is about 6 percent --

12 THE COURT: No, no. I guess I didn't make myself  
13 clear in light of the objection.

14 MR. THORNBURGH: Sure.

15 THE COURT: I now understand the assumptions. I  
16 understand the different bars. Ask him questions. I --  
17 there's no basis in the record to say that the market -- in  
18 the record -- to say that the market share is 6 percent,  
19 though that might be a warranted inference and it may be  
20 helpful that I have it. But as we sit here today, he's not  
21 going to testify to it.

22 MR. THORNBURGH: Fair enough, your Honor.

23 THE COURT: But maybe you can get some information  
24 from him that's helpful. Go ahead.

25 Q. Just for the moment, Dr. Hill, assuming these numbers

1 are true, I'm not asking you to agree with them or not, but  
2 assuming they're true, using your market-share logic that  
3 you testified to on direct this morning, we can infer from  
4 that that Spirit is offering a higher value unbundled  
5 product than JetBlue; correct?

6 A. Than JetBlue? But JetBlue -- I mean, you took out a  
7 large part of JetBlue's share here.

8 Q. We took out the part of JetBlue's share that's not  
9 offering an unbundled product. So just comparing the two  
10 unbundled products using your market-share logic from this  
11 morning, Dr. Hill, this would seem to suggest that Spirit is  
12 offering a more valuable unbundled product than the JetBlue  
13 unbundled product; correct?

14 A. Yeah, I'm not totally sure what you've done here but I  
15 don't think it's necessarily an apt comparison. Because if  
16 the part of the JetBlue plane that's not Blue Basic fares  
17 sells out, then there may not be Blue Basic fare  
18 availability. So I see where you're going but I'm just  
19 not -- I'm not sure that you can draw that inference here.

20 Q. Well, I'll represent to you, sir, that on the vast  
21 majority of JetBlue flights, JetBlue does not limit the  
22 number of Blue Basic tickets that it sells. So if you  
23 assume that, does that change your answer?

24 A. I'm not arguing that it limits them, just if other  
25 tickets have sold, then you can only sell a limited amount

1 of Blue Basic tickets. So if there's heavy demand for the  
2 non-Blue Basic tickets, it puts a limit on how many Blue  
3 Basic fares you can sell.

4 THE COURT: Well, let's try this. If I even  
5 understand what this shows. Could I, from this, could I  
6 draw the inference that more people prefer flying in the  
7 rather spartan Spirit seats than prefer flying in the more  
8 comfortable JetBlue seats on Blue Basic fares?

9 THE WITNESS: I think what you could say here is  
10 that more people do fly Spirit than fly Blue Basic. The  
11 difficulty with the inference here is that these Blue Basic  
12 fares are also competing with ordinary Blue -- JetBlue  
13 fares. So if a JetBlue fare goes on sale for a particular  
14 route at a particular time, and many customers buy the other  
15 fares, the non-Blue Basic, it puts an upward cap on how many  
16 Blue Basic fares can be sold.

17 THE COURT: Well, you've made that point. I see.  
18 All right.

19 THE WITNESS: Yeah. Sorry, your Honor.

20 THE COURT: And, Mr. Thornburgh, go ahead.

21 Q. Dr. Hill --

22 MR. THORNBURGH: If you can go back to slide 15  
23 for just a moment in Dr. Hill's presentation.

24 (On screen.)

25 Q. To calculate the figures that we're about to see on

1 slide 15, you used Dr. Gowrisankaran's definitions of  
2 nonstop presumption overlap markets; right?

3 A. That's correct, I believe.

4 Q. You didn't calculate these shares using alternative  
5 markets that you put forward, for example; correct,  
6 Dr. Hill?

7 A. That's correct.

8 Q. You didn't offer any alternative relevant markets in  
9 your report; correct, sir?

10 A. That's correct.

11 Q. And with the exception of a few critiques that you  
12 offer on how Dr. Gowrisankaran defined the Orlando and  
13 Puerto Rico markets in certain circumstances, you did not  
14 offer in your report any other specific critiques of  
15 relevant markets that Dr. Gowrisankaran defined; correct?

16 A. Correct.

17 Q. Dr. Hill, you would agree with me that today customers  
18 in the markets where both JetBlue and Spirit compete get to  
19 choose between the products offered by both airlines; right?

20 A. In overlaps, yes.

21 Q. And this includes the ability to choose between the  
22 different amenities that each airline offers; correct?

23 A. Yeah. Subject to the discussion we previously had  
24 about whether an amenity is offered or not, yes.

25 Q. And, Dr. Hill, you acknowledge that the loss of this

1 product choice or product variety, as it's sometimes called,  
2 is an independent harm aside from any increase in fares that  
3 consumers might face as a result of this transaction;  
4 correct?

5 A. It could be. I didn't -- I don't think I've said that  
6 it is.

7 Q. Right. I don't -- my question wasn't asking whether it  
8 is, my question is just you acknowledge that the loss of  
9 product variety is an independent source of harm under the  
10 merger guidelines; correct?

11 A. It can be, in the merger guidelines, yes.

12 Q. And it could be applicable -- it could be the type of  
13 harm that some consumers would face as a result of this  
14 transaction; right?

15 A. It could be, yes.

16 Q. Let's go to slide 13 of your direct, if we could,  
17 Dr. Hill.

18 A. Do you mind bringing it up on the screen, actually,  
19 it's easier -- thank you.

20 (On screen.)

21 Q. The average annual incomes you report here are based on  
22 ZIP codes where passengers live; right?

23 A. That's correct.

24 Q. And so to come up with the figures that are depicted  
25 here, you used the mean or average income in each ZIP code;

1 correct?

2 A. Correct.

3 Q. So even if a particular ZIP code had a widespread of  
4 annual income, say less than \$50,000 to over \$200,000, your  
5 analysis is based only on the mean annual income in that  
6 specific ZIP code; right?

7 A. That's correct.

8 Q. Your analysis doesn't foreclose the possibility that  
9 passengers flying on Spirit, for example, all might have a  
10 household income that is below the mean annual income in a  
11 particular ZIP code; correct?

12 A. It does not. But in my report I also looked at this  
13 for JetBlue passengers more generally, and they have a  
14 higher average income than Blue Basic. So there's also, in  
15 the report, you can see that the Blue Basic JetBlue  
16 passengers seem to be buying -- seem to be from a different  
17 set of ZIP codes than all JetBlue passengers.

18 Q. Dr. Hill, in your report you didn't cite any  
19 ordinary-course materials produced by either JetBlue or  
20 Spirit to support your finding here; correct?

21 A. I don't believe so.

22 Q. Let's switch gears. Dr. Hill, you did not offer an  
23 opinion in your report that the divestiture buyers should be  
24 assigned shares on any particular route; correct?

25 A. Correct.

1 Q. You didn't describe the divestiture buyers as rapid  
2 entrants at any place in your report; correct?

3 A. That's correct.

4 Q. You are not offering an opinion that Allegiant or  
5 Frontier will fly on any particular route or set of routes  
6 as a result of purchasing the divestiture assets; correct?

7 A. That's fair.

8 Q. So you cannot rule out the possibility that neither  
9 Allegiant nor Frontier will enter any of the nonstop  
10 presumption routes that touch a divestiture airport;  
11 correct?

12 A. Yeah, I mean, I think they both testified they're still  
13 figuring out exactly which routes they plan to compete on.

14 Q. You have not pointed to any evidence, Dr. Hill, that  
15 Allegiant plans to operate on the same routes that Spirit  
16 serves today out of Boston or Fort Lauderdale; correct?

17 A. That's fair.

18 Q. And you have not pointed to any evidence that Frontier  
19 plans to operate in the same markets that Spirit serves  
20 today out of LaGuardia or the New York City metro area;  
21 correct?

22 A. That's fair.

23 Q. Let's go to slide 7 of your direct, please.

24 (On screen.)

25 Q. So, Dr. Hill, here you used Dr. Chipty's endpoint

1 presence model to purportedly predict the likelihood of ULCC  
2 entry on these categories of markets; correct?

3 A. So this is for ULCC entry in the ordinary course within  
4 one year, yes.

5 Q. You understand Dr. Chipty's model was designed to  
6 understand the relationship between endpoint presence and  
7 entry as it had occurred in the past by ULCCs; correct?

8 A. That's what she said, yes, but it can predict the  
9 probability of entry based on endpoint presence. The only  
10 way it can do that is if it can also predict the probability  
11 of entry.

12 Q. You are aware that Dr. Chipty specifically warned  
13 against using her endpoint presence model to try to predict  
14 future entry; right?

15 A. Yes.

16 Q. Your use of Dr. Chipty's model does not account for  
17 changes to an airline's network strategy that has recently  
18 taken place, such as Frontier's decision to fly more of its  
19 routes back to home bases each day; correct?

20 A. I mean, it's looking over time at the 4,700 entry  
21 events Dr. Chipty purports to use, so whatever changes  
22 happened in network strategies in that time period are  
23 captured.

24 Q. But it wouldn't capture the Frontier change in strategy  
25 that was just announced a few months ago; correct, sir?



1 A. No. It's looking at past experience to predict the  
2 future.

3 Q. And your use of Dr. Chipty's model does also not  
4 account for limitations on the availability of planes and  
5 pilots that we've heard testimony about in this courtroom;  
6 correct?

7 A. Correct.

8 Q. So putting aside those issues, what this chart shows is  
9 that there is, at best, a 40 percent likelihood that a ULCC  
10 enters any particular route in one year; right?

11 A. So this is the ordinary-course probability absent some  
12 kind of anticompetitive price increase. This is just  
13 ordinary course, 40 percent of those routes would expect to  
14 see entry by a ULCC within one year.

15 Q. Let me ask you about that, Dr. Hill. You would  
16 acknowledge that airlines have probably tried to increase  
17 prices on some of the routes that were included in this  
18 analysis previously; right?

19 A. They probably increased and decreased prices, yes. I  
20 mean, there's a natural fluctuation.

21 Q. Dr. Hill, these figures give no indication of whether  
22 entry by a ULCC would be sufficient to fully replace the  
23 competition that Spirit brings to markets where it operates  
24 today; correct?

25 A. Yeah. This is just looking at ordinary-course entry.

1 It's not making a further representation that they'll either  
2 do more than replace or do less than replace.

3 Q. Earlier this morning you presented on a slide that  
4 looked at the frequency with which Spirit operates on 15 of  
5 Dr. Gowrisankaran's nonstop overlap presumption markets. Do  
6 you recall that?

7 A. Are you talking about the slide with the 15 nonstop  
8 overlap routes?

9 Q. Yes.

10 A. Yeah.

11 Q. Besides that analysis where you looked at Spirit's  
12 current presence or frequency on those routes, you did not  
13 undertake any other analysis to understand what level of  
14 entry by another carrier would be necessary to fully replace  
15 Spirit; correct?

16 A. I don't think that's quite true just because of my  
17 answer. I think in my supplemental exhibits I looked at all  
18 51 of those routes, and we just talked about 15 this  
19 morning. But other than that I didn't otherwise analyze it.

20 Q. Let's go to slide 10 of your direct, please.

21 (On screen.)

22 Q. So, Dr. Hill, here you quoted some testimony from other  
23 ULCC carriers about expanding into Spirit routes; correct?

24 A. That's correct.

25 Q. None of the testimony here indicates where the planes

1 would be coming from to replace Spirit; right?

2 A. Correct.

3 Q. You haven't done any sort of quantitative analysis  
4 yourself to determine the ability of ultra low-cost carriers  
5 to fulfill their standalone network plans while also  
6 replacing the competition lost from this transaction;  
7 correct?

8 A. I disagree a little. I mean, I did do quantitative  
9 analysis of the total expected change in total number of  
10 planes. So I think that qualifies, unless -- yeah.

11 Q. Sorry. Can you clarify what analysis you're referring  
12 to?

13 A. Yeah. So if we -- maybe it's back on slide 7.

14 MR. THORNBURGH: Can we go to slide 7, please?

15 A. Maybe I have the wrong one. Let me see. Oh, sorry.

16 MR. THORNBURGH: Let's go to slide 11. I think  
17 this is the one Dr. Hill may be referring to.

18 A. Yeah, slide 11.

19 Q. Okay. So, Dr. Hill, the -- I'll wait for it to come up  
20 on the screen here.

21 (On screen.)

22 Q. The chart on the right, this was figures that were  
23 taken in part from these airlines' publicly available  
24 10-K's; correct?

25 A. That's correct.

1 Q. And some of these publicly available 10-K's predate the  
2 announcement of this transaction; right?

3 A. That's possible.

4 Q. Right. So these fleet plans were plans that these  
5 airlines had in place prior to the announcement of this  
6 transaction; correct?

7 A. I don't think that's generally true, but it's possible  
8 for some of them.

9 Q. Regardless, the number of planes that these airlines  
10 choose to get, that doesn't tell you whether these airlines  
11 would have an ability to both fulfill their standalone  
12 growth plans while also replacing the competition that would  
13 be lost as a result of this transaction; correct?

14 A. I mean, I think it's a reasonable way to look at the  
15 issue and, you know, the testimony from Mr. Biffle in the  
16 upper left-hand corner here is saying we can ramp up or down  
17 based on conditions.

18 Q. Dr. Hill, you were here for the testimony of Mr. Hayes  
19 where he talked about the inability of JetBlue to get  
20 additional Airbus aircraft before 2030; correct?

21 A. I think it's you can't place an order for new  
22 deliveries before 2030, yes.

23 Q. You didn't independently study Frontier's ability to  
24 get additional planes; correct?

25 A. No. I heard Mr. Biffle's testimony but I did not study

1 it.

2 Q. Dr. Hill, throughout your report you indicate that this  
3 transaction will enable JetBlue to better compete against  
4 the big four. Do you recall that?

5 A. I do.

6 Q. Okay. I want to hand up a demonstrative now. This  
7 just contains a screenshot of a paragraph from your summary  
8 of opinions in your report, as well as a figure from your  
9 presentation this morning.

10 THE COURT: Before we go on, let me interject with  
11 this question.

12 Assume now that when I come to finding facts I  
13 adopt your approach and draw inferences as to possible  
14 benefits and burdens from this merger. Inevitably it's --  
15 and I'll state this, I'll state this now, it seems to me  
16 that as -- if this goes forward it's going to take some time  
17 to shake out, an expression, but you'd agree with that?  
18 Things don't just instantly happen. A slot opens up and the  
19 contracted ULCC jumps in and planes begin to fly painted in  
20 that logo. So some time passes. How have you calculated  
21 for that time? Or is your approach the picture that I ought  
22 be adopting after things have shaken out? Does my question  
23 make sense?

24 THE WITNESS: It does, your Honor.

25 THE COURT: And what about that?

1 THE WITNESS: Yeah, so generally in antitrust  
2 analysis we think about there's a short-term adjustment  
3 period and a longer term equilibrium. So what I'm looking  
4 at here is the longer term equilibrium. You're absolutely  
5 right, your Honor. I believe Mr. Biffle and Mr. Wells both  
6 said it will take us some time to get the slots and then to  
7 be able to use them. I think it was within six months. But  
8 there is a lag period. And what I'm thinking of here is  
9 sort of the long-term equilibrium.

10 THE COURT: Thank you.

11 THE WITNESS: You're welcome, your Honor.

12 THE COURT: I interrupted, Mr. Thornburgh. You go  
13 right ahead.

14 MR. THORNBURGH: Always welcome to interrupt me,  
15 your Honor.

16 Q. So, Dr. Hill, on the demonstrative in front of you,  
17 Hill Demonstrative G, on the right-hand side is a paragraph  
18 from your report. Do you recognize that?

19 A. I do.

20 Q. And in that paragraph you talk about how this  
21 transaction will better enable JetBlue to compete against  
22 the big four, which includes Southwest; right?

23 A. Correct.

24 Q. And then on the left, which is a exhibit or a slide  
25 from your presentation this morning; right?

1 A. That's correct.

2 Q. And there you are indicating on what routes Southwest  
3 is either present or has a substantial presence at one of  
4 the endpoints; right?

5 A. Correct.

6 Q. You would agree, Dr. Hill, that Southwest has, on  
7 average, higher fares than Spirit; right?

8 A. That's fair.

9 Q. Southwest does not offer an unbundled product like  
10 Spirit; right, Dr. Hill?

11 A. I'm not sure I'd put it in those terms, but it's fair  
12 to say that Southwest you don't have the -- well -- sure, we  
13 can go ahead with that.

14 Q. You'd also agree that other ULCCs are more likely than  
15 Southwest to have a similar effect as Spirit on lowering  
16 fares in a market; right?

17 A. That other ULCCs?

18 Q. Correct.

19 A. Yes, I believe that's fair.

20 Q. So, Dr. Hill, on one hand you were arguing that this  
21 transaction will enable JetBlue to better compete against  
22 Southwest, while on the other you're also arguing that  
23 Southwest is well-positioned to remedy potential harm that  
24 is associated with this transaction; correct?

25 A. Correct.

1 MR. THORNBURGH: If we can go to slide 46, please.

2 (On screen.)

3 Q. So, Dr. Hill, this is the slide that you spoke to this  
4 morning about the American-US Airways merger. Do you recall  
5 that?

6 A. I do.

7 Q. Dr. Hill, you don't have an opinion of as to how these  
8 divestitures impacted competition on individual origin and  
9 destination markets touching Reagan National Airport;  
10 correct?

11 THE COURT: I didn't catch the whole -- you don't  
12 have an opinion on how these divestitures affected, did you  
13 say -- pick up there. Origin?

14 MR. THORNBURGH: Competition on origin and  
15 destination markets that touched Reagan Airport, which is  
16 what's depicted on the screen, your Honor.

17 THE COURT: Thank you.

18 MR. THORNBURGH: Of course.

19 A. So just a mild modification. So, first, in general  
20 you're right. The figure is just looking at what happened  
21 in aggregate at Reagan National. And then I separately, in  
22 my report, also looked at what happened to  
23 existing/preexisting routes at Reagan National. And what I  
24 found is on those routes, routes that were already being  
25 served, those continue to be served at about the same



1 volumes.

2 So putting the two figures together, what happened was  
3 the, especially the divestiture buyers, entered a bunch of  
4 new routes, but I haven't individually analyzed which routes  
5 they competed on while maintaining service on their existing  
6 routes.

7 Q. You didn't look at how these divestitures impacted the  
8 prices or fares on any particular market; correct, Dr. Hill?

9 A. On any particular route, that's correct.

10 Q. I want to switch focuses now and talk more about how  
11 you evaluated potential harm in overlap markets.

12 MR. THORNBURGH: And if we could start, please, by  
13 going to slide 30 of Dr. Hill's presentation this morning.

14 (On screen.)

15 Q. So, Dr. Hill, I just want to start by making sure  
16 something is clear. You would agree that there are more  
17 than 51 markets where JetBlue and Spirit compete as  
18 nonstop -- nonstop markets where JetBlue and Spirit compete  
19 today; right?

20 A. Correct.

21 Q. So there's the 51 nonstop presumption markets, as you  
22 indicated here; correct?

23 A. Correct.

24 Q. But there are additional nonstop overlap markets where  
25 JetBlue and Spirit compete that just don't have the HHIs

1 that meet the threshold under the merger guidelines;  
2 correct?

3 A. Correct.

4 Q. Okay. Those would be included in your econometric  
5 category that is depicted on the screen; correct?

6 A. That's fair.

7 Q. So, Dr. Hill, you would agree with me that when you  
8 typically evaluate the competitive effects of a merger with  
9 two head-to-head competitors, you use a framework that is  
10 consistent with the horizontal merger guidelines; correct?

11 A. Typically true, yeah.

12 Q. Okay. And, Dr. Hill, as we already discussed this  
13 morning, you did not apply your entry intensity model to the  
14 overlap markets where JetBlue and Spirit compete; right?

15 A. Correct.

16 Q. Instead, Dr. Hill, you looked at the overlap markets  
17 where Dr. Gowrisankaran alleged harm and you identified  
18 purported disqualifying deficiencies with many of these  
19 markets; right?

20 A. Yeah, that's correct.

21 Q. And if you found that a route had just one of these  
22 disqualifying deficiencies, you determined that there would  
23 be no harm on that route; correct?

24 A. Well, I started by taking deficiencies that I thought  
25 were sufficient to disqualify routes. But, yes, within that

1 framework, correct.

2 Q. So once you applied your disqualifying deficiencies to  
3 the overlap markets where JetBlue and Spirit compete today,  
4 that's how you got the 15 holdout routes, as you call them;  
5 correct, Dr. Hill?

6 A. Correct.

7 Q. So I want to talk about some of these disqualifying  
8 deficiencies for a moment. So we have another demonstrative  
9 I'd like now to guide our discussion. And this is a  
10 demonstrative that was shared with your counsel previously.

11 (Handing.)

12 MR. THORNBURGH: We can go ahead and put it up on  
13 the screen.

14 (On screen.)

15 Q. So I'd like to start, Dr. Hill, with the Lima-Miami  
16 market. You identified two purported disqualifying  
17 deficiencies with that market; correct?

18 A. Correct.

19 Q. One of the two disqualifying deficiencies was that it  
20 didn't have HHIs or market shares that meet the presumption  
21 threshold when you use revenue shares; correct?

22 A. That's correct.

23 Q. But you understand that the market did meet the  
24 presumption when you use passenger shares; right?

25 A. Correct.

1 Q. You also understand that using revenue shares for this  
2 market, it still was a highly concentrated market under the  
3 merger guidelines; correct?

4 A. That's correct.

5 Q. And so under the merger guidelines for a highly  
6 concentrated market, that raises significant competitive  
7 concerns and often warrants further scrutiny; correct?

8 A. I can't remember the exact wording from the guidelines  
9 on that. But, in general, they say that moderately  
10 concentrated routes can raise concerns and merit further  
11 scrutiny.

12 Q. If it's a highly concentrated market but it doesn't  
13 have a change in concentration that rises to above 200 HHIs  
14 it can raise significant competitive concerns; correct?

15 A. It can.

16 Q. And you have indicated previously, Dr. Hill, that when  
17 you usually evaluate competition in such a highly  
18 concentrated market you would look at qualitative evidence,  
19 the concentration numbers, and you would also perform a  
20 competition analysis; is that fair?

21 A. Could you direct me to that, please? I may have said  
22 that. I just don't recall.

23 Q. Sure. If you want to look at page 54 of your  
24 deposition, sir.

25 A. Sure.

1 (On screen.)

2 A. I'm there.

3 Q. So it's, if you look at lines 19, starting on page 54,  
4 and then you read over to page 55, Dr. Hill. Does that  
5 refresh your memory as to the type of analysis that you  
6 usually conduct in such a market?

7 (Witness reviewed document.)

8 A. Yes.

9 Q. So you would agree with me then in such a market you  
10 typically would look at qualitative evidence, the  
11 concentration numbers, and you would also perform a  
12 competition analysis; right?

13 A. Sure.

14 Q. But in this case, or in the case of the Lima-to-Miami  
15 market --

16 MR. THORNBURGH: If we can go back to that slide,  
17 please.

18 (On screen.)

19 Q. -- you did not perform such an analysis here; correct?

20 A. I disagree because this market is affected by the  
21 divestitures.

22 Q. Okay. Fair enough. And we will get to the  
23 divestitures.

24 So besides identifying that this market touched a  
25 divestiture airport, you did not do any other analysis to

1 better understand competition on the Lima-to-Miami market;  
2 correct, sir?

3 A. I wouldn't say narrowly, but in general I looked at the  
4 fact that entry and repositioning are common in the  
5 industry. In fact, I think Sky Peru has now entered this  
6 route and it no longer meets either of the thresholds.

7 Q. Again, Dr. Hill, when you evaluated this market for  
8 purposes of offering your opinions in your report, besides  
9 noting that it touches -- that this market touched a  
10 divestiture airport, you did not do any other further  
11 analysis to understand how -- what competition was going on  
12 there; correct?

13 MR. GELFAND: Objection. Asked and answered.

14 THE COURT: I think it is. I understand his  
15 answer to this question to be yes. So that's where I am.  
16 You go ahead, Mr. Thornburgh. Sustained. He did not.

17 Q. Dr. Hill, there were 12 econometric routes that, as you  
18 categorized them, which had HHIs that the guidelines  
19 indicated warrant further scrutiny, but you disqualified  
20 them if they had shares that did not meet the presumption;  
21 right?

22 A. Are you saying solely disqualified them on that  
23 grounds?

24 Q. That wasn't my question. My question was you supplied  
25 a disqualifying deficiency to them if they had shares that

1 did not meet the presumption under the merger guidelines?

2 A. Yes, but all of them also were divestiture airports.

3 Q. Okay. So let's talk about that second deficiency that  
4 you identified with regards to this market which, as you  
5 just indicated, related to the divestitures at the Fort  
6 Lauderdale Airport; correct?

7 A. Correct.

8 Q. And if a route touched an airport where there were  
9 divestitures you labeled it as a disqualifying deficiency;  
10 correct?

11 A. Correct.

12 Q. It didn't matter where the other endpoint on that route  
13 was, so long as there was an endpoint in a market that  
14 touched a divestiture airport that -- then you gave it a  
15 disqualifying deficiency; correct?

16 A. Correct.

17 Q. So, Dr. Hill, first, you've heard the testimony of  
18 Mr. Gale from the Broward County Airport Authority; correct?

19 A. I did.

20 Q. You heard Mr. Gale testify that JetBlue does not have  
21 the right to divest its gates at Fort Lauderdale Airport;  
22 correct?

23 A. Correct.

24 Q. But you didn't factor that into your analysis of the  
25 divestitures for the opinions you offered in your report;

1 correct?

2 A. I -- I didn't consider Mr. Gale's particular testimony  
3 on that but, again, the way I thought about the divestitures  
4 is they maintain competition at the level of the airport  
5 and --

6 Q. You -- I'm sorry. I didn't mean to cut you off.

7 A. I apologize. No, you go ahead, please.

8 Q. When I took your deposition earlier this year, sir, you  
9 were not aware of Mr. Gale's testimony on this topic; right?

10 A. That's correct.

11 Q. So putting that aside, you heard the testimony of  
12 Allegiant's Mr. Wells in court; correct?

13 A. Correct.

14 Q. And he indicated that Allegiant has no existing plans  
15 to offer international service except to or from Mexico as  
16 part of its joint venture; correct?

17 A. I don't think that's quite fair. I -- well, it depends  
18 what you mean by existing plans. What he said was they  
19 don't currently have authorization. They have a plan for  
20 their -- or at least I recall the plan for their joint  
21 venture with Viva Aerobus, and then their plan after that to  
22 enter the Caribbean and Latin America.

23 Q. Do you recall Mr. Wells offering any definitive plans  
24 that Allegiant had to enter any markets, international  
25 markets, other than in Mexico, sir?



1 A. Yeah. He said they don't have definitive plans.

2 Q. So since Lima is not in Mexico, fair to say that the  
3 divestitures aren't likely to facilitate entry in this  
4 particular market anytime soon; correct?

5 A. This particular route, yes. Well, I apologize. I  
6 shouldn't say yes. What do you mean by "anytime soon"?

7 Q. As you understand it, sir.

8 A. I mean, in the short run I think that's fair, but in  
9 the longer run I can't opine on that.

10 Q. So, Dr. Hill, even though you say that you think it's  
11 right to analyze the divestitures at the airport level, you  
12 use the airport-level divestitures to conclude that there  
13 wouldn't be harm in specific markets like the Lima-to-Miami  
14 market; correct, sir?

15 A. I would put it slightly differently. The way I think  
16 about it is it's going to preserve competition at the  
17 airport. There may be a route that Allegiant decides not to  
18 serve, but if it does it's going to use those assets to  
19 compete on another route which will benefit. And I am,  
20 you're correct, assuming that those switches in network will  
21 essentially cancel each other out.

22 Q. If you could please turn to slide 19 from your direct,  
23 please.

24 (On screen.)

25 Q. Dr. Hill, this is a slide from this morning where you

1 offer testimony about some of your critiques of  
2 Dr. Gowrisankaran's harm model; correct?

3 A. That's correct.

4 Q. Okay.

5 MR. THORNBURGH: And we have another  
6 demonstrative, this will be Hill Demonstrative H, and this  
7 contains this slide and then just a figure from  
8 Dr. Gowrisankaran's report next to each other. If we could  
9 put that up on the slide and then provide it to the Court,  
10 please.

11 (Handing.)

12 (On screen.)

13 Q. Dr. Hill, you recognize the figure on the right, I  
14 presume, from your review of Dr. Gowrisankaran's reply  
15 report; is that fair?

16 A. It's familiar, yes.

17 Q. Okay. So I want to just go through the critiques that  
18 you offered here fairly quickly. Your first critique was  
19 that Dr. Gowrisankaran's model relied on less data than your  
20 model; correct?

21 A. That's fair.

22 Q. You understand that Dr. Gowrisankaran ran a sensitivity  
23 of his model to address that particular critique; right?

24 A. Just making that change? Yes.

25 Q. And that change is indicated by the bar that's labeled,

1 "Using Dr. Hill's 2011 to 2019 data." Do you see that?

2 A. I do.

3 Q. And he found \$835 million in weighted harm; correct?

4 MR. GELFAND: Your Honor, I object to this line of  
5 questions. The government is taking an exhibit out of the  
6 report that wasn't presented to the Court. Dr. Hill's  
7 testimony is about the evidence in court.

8 THE COURT: It is. But I think this is  
9 appropriate. He may proceed.

10 MR. THORNBURGH: Thank you, your Honor.

11 Q. Dr. Hill, the reason you have more entry events than  
12 Dr. Gowrisankaran, as you testified this morning, is that  
13 you used older entry events than Dr. Gowrisankaran did;  
14 correct?

15 A. I used more years, yes.

16 Q. You used entry events for both JetBlue and Spirit going  
17 back to 2012, whereas Dr. Gowrisankaran limited his entry  
18 events from 2017 to 2019; right?

19 A. So I believe I went back to 2011, that was my earliest,  
20 and Professor Gowrisankaran only uses the first quarter of  
21 2019. But other than that, agree.

22 Q. Fair enough. Thank you, sir.

23 In 2012, Dr. Hill, US Airways had not purchased  
24 American Airlines yet; right?

25 A. That's correct.

1 Q. In 2012 Frontier had not transitioned to a ULCC  
2 carrier; correct?

3 A. That's fair.

4 MR. THORNBURGH: Let's look at Dr. Gowrisankaran's  
5 Reply Exhibit 17, if we could, on page 71 of his reply  
6 report.

7 Q. This will be put on the screen in front of you. Do you  
8 recognize this figure, Dr. Hill?

9 (On screen.)

10 A. Yes.

11 Q. Okay. And this figure from Dr. Gowrisankaran's report  
12 is comparing the JetBlue and Spirit Effects between two time  
13 periods; correct?

14 MR. GELFAND: Your Honor, I have the same  
15 objection.

16 A. Correct. I'm sorry.

17 MR. GELFAND: They're using his report --

18 THE COURT: Well, more fundamentally, he's lost me  
19 now. Where are you? What are you looking at?

20 MR. THORNBURGH: There should be, in your binder,  
21 there's a tab marked, "Dr. Gowrisankaran's Reply Report."

22 THE COURT: I see it.

23 MR. THORNBURGH: I'm on page 71 of that report,  
24 your Honor.

25 THE COURT: Thank you.

1 MR. GELFAND: Your Honor, may I be heard on the  
2 objection when your Honor is ready?

3 THE COURT: Yes. What page?

4 MR. THORNBURGH: 71, your Honor.

5 THE COURT: Now, your question and then I'll hear  
6 counsel. What's your question?

7 MR. THORNBURGH: My question to Dr. Hill was you  
8 recognize this figure as showing the JetBlue and Spirit  
9 Effects for two different time periods.

10 THE COURT: In your expert's reply report?

11 MR. THORNBURGH: Correct. So my first question  
12 was whether Dr. Hill was familiar with it, or recognized it,  
13 I think was my wording, and I think he said yes.

14 THE COURT: I'll allow a few questions.  
15 Overruled. A few questions.

16 MR. THORNBURGH: Just a few, your Honor.

17 Q. So, Dr. Hill, sorry, just to repeat my question. So  
18 you would agree this is purporting to show, at least, the  
19 impact of Spirit and JetBlue that they have on two different  
20 time periods; correct?

21 A. Correct.

22 Q. And as depicted on the chart in front of you, JetBlue  
23 had a larger effect in the period from 2012 to 2016;  
24 correct?

25 A. Correct.

1 Q. The Spirit Effect is largely unchanged, though, as  
2 depicted here; correct?

3 A. That's correct.

4 Q. Okay.

5 MR. THORNBURGH: Those are all my questions on  
6 that exhibit. If you can go back to the demonstrative that  
7 was previously on the screen.

8 (On screen.)

9 Q. So, Dr. Hill, your second critique was that  
10 Dr. Gowrisankaran's model predicts that more aggressive  
11 entry leads to higher fares; right?

12 A. Correct.

13 Q. And by that, you mean that as a result of the shape of  
14 the curve that Dr. Gowrisankaran utilized, his regression  
15 indicates increasing fares once you get to a capacity above  
16 a certain point; right?

17 A. That's correct.

18 Q. I think, as you testified this morning, you understand  
19 that he did not apply his harm model to those capacities in  
20 a range that would actually predict those fare increases;  
21 right?

22 A. I disagree a little. So if you look back at the  
23 figure, he did apply it to the area where the capacity for a  
24 while decreases -- increases the effect. So I add more  
25 planes, fares come down. And then it turns and adding more

1 planes leads to higher fares relative to what would have  
2 happened with fewer planes. But it doesn't cross over the  
3 actually overall positive until later. So with that  
4 clarification, I'll agree.

5 Q. Okay. Thank you, Dr. Hill.

6 And if we look at the figure on the right here, you  
7 understand that Dr. Gowrisankaran ran a sensitivity to  
8 address this particular critique by using a linear model.  
9 Do you see that?

10 A. I do.

11 Q. Okay. And when he ran that, the model addressing that  
12 particular critique, he actually found more harm than he  
13 reported in his initial report; correct?

14 A. That's what he reports, yes.

15 Q. Your fifth critique, Dr. Hill, was that  
16 Dr. Gowrisankaran's model assumed that Spirit's impact is  
17 unaffected by JetBlue; correct?

18 A. Correct.

19 Q. In other words, your critique was that his model does  
20 not control for the Spirit Effect in markets where JetBlue  
21 was already a competitor; is that right?

22 A. Yeah, how -- yeah, that's fair.

23 Q. Okay. And, again, you understand that  
24 Dr. Gowrisankaran ran a sensitivity to address this  
25 particular concern; right?

1 A. Yes. In isolation he did.

2 Q. And it says, if you look at the chart on the right,  
3 there's a bar that says, "Allowing Spirit Effect to Differ  
4 in JetBlue markets." Do you see that?

5 A. Yes, I do.

6 Q. And when Dr. Gowrisankaran addressed that particular  
7 sensitivity he found \$926 million in annual harm; right?

8 MR. GELFAND: Same objection, your Honor. This is  
9 an improper attempt to read into the record --

10 THE COURT: If I need argument I will call for it.  
11 I'm going to sustain that objection. Go ahead. I mean, we  
12 all understand that the reports are not evidence.

13 MR. THORNBURGH: Of course, your Honor.

14 Q. I want to talk about the third critique here, Dr. Hill,  
15 which you said that Dr. Gowrisankaran's model is sensitive  
16 to small and reasonable changes in its assumptions. Do you  
17 see that?

18 A. I do.

19 Q. And this morning when you testified about that  
20 particular critique you focused on what is called an  
21 "intercept term" and whether it's included in  
22 Dr. Gowrisankaran's model; correct?

23 A. It's the intercept of the marginal effect, not the  
24 intercept, per se. There's still an intercept term in the  
25 model I used for Professor Gowrisankaran.



1 Q. Dr. Hill, you didn't cite any academic literature in  
2 your report to support your opinion about what to do with  
3 Dr. Gowrisankaran's intercept term; correct?

4 A. That's true. This is a common way to approach the  
5 marginal effect.

6 Q. Dr. Hill, the last critique I don't think that we've  
7 talked about yet is number four where you said that  
8 Dr. Gowrisankaran's model gives credit for lower fares but  
9 not for higher quality; right?

10 A. Correct.

11 Q. Your entry intensity model does not include a  
12 correction or an adjustment for quality; correct?

13 A. That's correct.

14 Q. I'm going to switch topics.

15 MR. THORNBURGH: If we could go to slide 6 of  
16 Dr. Hill's direct presentation, please.

17 (On screen.)

18 Q. So, Dr. Hill, you testified this morning on this slide  
19 that Dr. Gowrisankaran's nonstop presumption markets have  
20 changed materially. Do you recall that?

21 A. Yes.

22 Q. Besides looking at this analysis from  
23 Dr. Gowrisankaran, did you do any of your own analysis to  
24 understand how consistent Dr. Gowrisankaran's nonstop  
25 presumption markets have been over time?

1 A. I have not.

2 Q. Well, let's look at some data that would speak to that.  
3 On -- I believe it will either be passed out to you or it's  
4 already in your binder, is Hill 1006 Amended Summary 2.

5 A. Which binder should I look in? Or if it comes up on  
6 the screen, that's fine.

7 (On screen.)

8 A. Oh, that's okay.

9 Q. It's admittedly small font.

10 A. That's fine. I have my glasses.

11 Q. Okay.

12 MR. THORNBURGH: Your Honor, I believe there's a  
13 large printout of this particular 1006 Summary.

14 THE COURT: One devoutly hopes so.

15 MR. THORNBURGH: Do you have it there, your Honor?

16 THE COURT: Not yet. Yes.

17 MR. THORNBURGH: Okay.

18 Q. So, Dr. Hill, you recognize this demonstrative of -- as  
19 containing Dr. Gowrisankaran's nonstop presumption markets;  
20 correct?

21 A. It does contain the original 51, and then it has some  
22 additional ones, I think, at the bottom.

23 Q. Okay. And so what we've done here is we've added  
24 markets for which there is -- that have met the presumption  
25 in any of the three-year time window starting in 2021

1 through the current period. Oh, excuse me. Through 2020.

2 I apologize.

3 A. So the first column goes back to the COVID period?

4 Q. Q3 of 2020.

5 A. Okay.

6 Q. And you recognize that as containing market shares for  
7 a three-year window starting in 2020; right, Dr. Hill?

8 A. Yeah. It goes from -- you mean the Q3 2020 to Q2 2021?

9 Q. Correct. And then there's two additional time periods  
10 on the chart; correct, sir?

11 A. Yep, I see that.

12 Q. And you recognize the fields here as containing data  
13 aggregated from data sources including DB1B, OAG, and DiiO  
14 that you utilized to some degree in your report; correct,  
15 sir?

16 A. I would assume so, yes. That seems fair.

17 MR. THORNBURGH: Your Honor, plaintiffs ask that  
18 Hill 1006 Amended Summary 2 be introduced as Exhibit 882, I  
19 believe.

20 THE COURT: Any objection?

21 MR. GELFAND: No objection.

22 THE COURT: It may be admitted, Exhibit 882 in  
23 evidence.

24 (Exhibit 882 received in evidence.)

25 Q. Dr. Hill, we've taken this 1006 summary and we've added

1 another page with highlighting that is a demonstrative.

2 Sorry for multiple terms here. But we'll put that up on the  
3 screen in front of you, and I think some of my colleagues  
4 will pass it out to you as well.

5 A. Sure.

6 MR. THORNBURGH: Your Honor, you have this already  
7 in your materials.

8 (Handing.)

9 THE WITNESS: Thank you.

10 Q. So, Dr. Hill, we've taken this, the 1006 summary, and  
11 added some highlighting. The highlighting indicates, as the  
12 key shows at the bottom, markets where -- that have met the  
13 presumption for all of the last three years. Do you see  
14 that?

15 A. I do.

16 Q. And as you can see, there are 35 markets listed there;  
17 correct?

18 A. Correct.

19 Q. Dr. Hill, is it surprising to see that 35 of  
20 Dr. Gowrisankaran's nonstop presumption markets had market  
21 shares that exceeded the presumption the last three years in  
22 a row?

23 A. Well, I would note that I wouldn't put a ton of weight  
24 on the COVID ones, but I'm not surprised for the other two  
25 time periods.

1 Q. And I'll represent to you that those 35 markets  
2 represent 80 percent of the passengers that were in the  
3 nonstop presumption markets that Dr. Gowrisankaran defined  
4 in his initial report. Is that surprising to you?

5 MR. GELFAND: Objection, your Honor. A lawyer  
6 representing --

7 THE COURT: The objection is sustained.

8 MR. GELFAND: Thank you.

9 THE COURT: "Surprising."

10 MR. THORNBURGH: We can take that down.

11 Q. Dr. Hill --

12 MR. THORNBURGH: Let's go to slide 28 of  
13 Dr. Hill's direct, please.

14 (On screen.)

15 Q. Dr. Hill, on this slide you reported the output effect  
16 that you found when you changed the price variable in  
17 Dr. Gowrisankaran's model to passengers; correct?

18 A. That's correct.

19 Q. And you found it useful to do this type of analysis;  
20 correct?

21 A. Correct.

22 Q. You did not, though, present any output results from  
23 your own entry intensity model; correct?

24 A. Correct.

25 Q. Did you undertake the same analysis to see what your

1 model predicts about how total output would change in your  
2 increased competition routes?

3 A. I did not.

4 Q. Okay. So, Dr. Hill, you thought it would be useful to  
5 understand where Dr. Gowrisankaran's model predicts an  
6 increase in passengers, but you did not think it was useful  
7 to see whether your own model predicts an increase in  
8 passengers; is that right?

9 A. Yeah.

10 Q. Would it be a meaningful critique of your model,  
11 Dr. Hill, if it found an output or passenger decrease of 1  
12 to 2 percent in your increased competition routes?

13 A. I'd have to look at it and see what the analysis was.  
14 I just haven't done it.

15 Q. Dr. Hill, you calculated purported benefits to  
16 consumers associated with converting Spirit planes to  
17 JetBlue planes on your increased competition routes;  
18 correct?

19 A. That's correct.

20 Q. Those are the benefits that you found using your entry  
21 intensity model to analyze each carrier's impact on rival  
22 fares; right?

23 A. Correct.

24 Q. But beyond that calculation you did not qualify any  
25 additional benefits to consumers that would occur as a

1 result of this transaction; right?

2 A. That's fair.

3 Q. You also did not qualify to what extent, if any, a  
4 combined JetBlue would be bigger than JetBlue and Spirit as  
5 standalone competitors; correct?

6 A. Correct.

7 THE COURT: I need that question repeated. I'm  
8 sorry.

9 MR. THORNBURGH: Of course, your Honor.

10 Q. Dr. Hill, you also did not quantify to what extent, if  
11 any, a combined JetBlue airline would be bigger than JetBlue  
12 and Spirit as standalone separate airlines; correct?

13 THE COURT: And he said correct?

14 THE WITNESS: Correct, your Honor.

15 THE COURT: Thank you.

16 Q. Dr. Hill, you did not present in your report a  
17 route-by-route analysis of the purported benefits from the  
18 conversion of Spirit aircraft to JetBlue aircraft; correct?

19 A. That's correct.

20 Q. You presented an estimate, rather, at the aggregate  
21 level for converting Spirit planes to JetBlue planes on your  
22 increased competition routes; right?

23 A. That's correct.

24 Q. You did not present any estimate of benefits for the  
25 nonstop overlap routes where JetBlue and Spirit compete

1 today; correct?

2 A. Correct.

3 Q. Dr. Hill, your estimate of benefits in your increased  
4 competition routes assumes that JetBlue flies the Spirit  
5 planes in the same routes where Spirit flies today; correct?

6 A. That's correct.

7 Q. You heard testimony from Mr. Friedman, though, that in  
8 JetBlue's 2022 deal modeling they assumed that there would  
9 be a redeployment of approximately one-sixth of Spirit's  
10 network as it exists today; right?

11 A. That's true. I will say Professor Gowrisankaran did  
12 the same thing, he just assumed that, you know, we'll just  
13 take the current plans and work on that. And I followed him  
14 in that assumption.

15 Q. Mr. Friedman testified about an example of a market  
16 which was confidential so he identified it on row 122 of the  
17 deal modeling spreadsheet where JetBlue's modeling  
18 contemplated the combined airline removing service from that  
19 route. Do you recall that testimony, sir?

20 A. No, but I'll take your word for it.

21 Q. Because it was part -- because this route is a route  
22 where Spirit flies today, it's part of your increased  
23 competition routes and is a market for which you calculated  
24 benefits. Okay?

25 A. Okay.



1 Q. Do you know how much benefit, Dr. Hill, you ascribed to  
2 the market that Mr. Friedman acknowledged JetBlue modeled  
3 removing service from?

4 A. I do not.

5 Q. Would it surprise you to learn that it was more than  
6 \$4 million annually in benefit?

7 A. I haven't analyzed it. I mean, Professor Gowrisankaran  
8 and I looked at the current network and we analyzed that. I  
9 just don't know the answer to your question.

10 Q. Fair enough. You'd agree, though, that if JetBlue  
11 doesn't keep the Spirit planes in the market where the  
12 Spirit planes are operating today there would not be a  
13 benefit in that market; correct?

14 A. There may not be in that route, but if they're set onto  
15 another route they can have a similar equivalent effect on  
16 that route or less. But in average I would expect it to be  
17 similar.

18 Q. Dr. Hill, you made no effort to independently assess  
19 whether JetBlue was likely to keep flying the Spirit  
20 aircraft in the markets where Spirit aircraft fly today;  
21 right?

22 A. That's fair.

23 Q. Dr. Hill, nowhere in your report do you offer an  
24 opinion that there is a national market for scheduled air  
25 passenger service; correct, sir?

1 A. Correct.

2 Q. Nor will I find an opinion in your report that airlines  
3 offer a product to individual consumers that involves a,  
4 say, national product for air travel; right?

5 A. Well, that's fair.

6 Q. Your report doesn't contain an opinion that there is  
7 significant consumer substitution between different  
8 origin-and-destination pair markets; correct, sir?

9 A. So when you're -- are we talking about a particular  
10 route like Miami to Washington, D.C. and Fort Lauderdale to  
11 Washington, D.C.? What exactly do you have in mind?

12 Q. Sure. As an example, you did not study, Dr. Hill,  
13 whether there's customer substitution between, say, a route  
14 from Miami to Lima and a route from Los Angeles to Spokane,  
15 Washington; correct, sir?

16 A. That's fair.

17 Q. Dr. Hill, in prior cases you have testified that the  
18 question of market definition rests on customer  
19 substitution; correct, sir?

20 A. Yes, with the exception of supply side. If there's  
21 substantial swinging of capacity across markets then you may  
22 have a supply-side reason as well. But in general it's  
23 based on customer substitution.

24 Q. Okay. I want to switch gears again, talk a little bit,  
25 perhaps a little more than five minutes, but talk a little

1 bit about coordinated effects.

2 A. Sure.

3 Q. Dr. Hill, you would agree with me that the guidelines  
4 set three conditions for a merger to potentially increase  
5 the risk of coordination: The first, increased  
6 concentration in a moderately or highly concentrated market;  
7 the second, a market or markets that are vulnerable to  
8 coordinated conduct; and third, a credible basis for  
9 concluding that the merger may enhance that vulnerability;  
10 right?

11 MR. GELFAND: Objection, your Honor. I'm going to  
12 object. May I explain?

13 THE COURT: You're going to object what?

14 MR. GELFAND: I didn't want to just go on without  
15 getting permission to explain the basis of my objection.

16 THE COURT: I'll hear you.

17 MR. GELFAND: There's been a lot of talk in this  
18 trial about the merger guidelines. This is a policy  
19 document produced by the Justice Department, the prosecutor  
20 in this case. I object on relevance grounds. He's  
21 cross-examining with a government policy document created  
22 for the purpose of assisting the government in bringing  
23 cases. That's not part of his analysis, it's beyond the  
24 scope, and it's an improper use of a government policy  
25 document.

1 THE COURT: No, I don't think it's an improper use  
2 of it. He may use it. I will give it such weight as is its  
3 due.

4 And so put your question.

5 MR. THORNBURGH: So my first question was whether  
6 Dr. Hill agreed that the merger guidelines set three  
7 conditions.

8 THE COURT: Well, they say what they say. So a  
9 question would be: Do you think those are proper guidelines  
10 for analyzing the antitrust laws?

11 THE WITNESS: Yeah, I've used them in the past.  
12 Well, the guidelines, parts of the guidelines, certainly.

13 THE COURT: Understood. Go ahead.

14 MR. THORNBURGH: Thank you, your Honor.

15 Q. Dr. Hill, do you think the airline industry is  
16 susceptible to coordination today?

17 A. I haven't taken an opinion on that.

18 Q. You would agree with me though that there had been  
19 periods in the airline industry when -- prior periods in the  
20 airline industry when tacit coordination has occurred;  
21 correct?

22 A. Could you say which periods you have in mind?

23 THE COURT: Well, apparently there was a lawsuit  
24 on this and now there's a consent decree. And I am  
25 sensitive to the sporadic evidence of such coordination.

1 I'm really not clear what to make of it. I'm not sure you  
2 can get it from this witness who's here pursuant to rule  
3 702. But I don't foreclose it. Go ahead.

4 A. So the --

5 THE COURT: Well, go ahead. There's no question.  
6 He'll ask.

7 THE WITNESS: Oh.

8 Q. Dr. Hill, you've indicated previously that there have  
9 been periods in the past in the airline industry when tacit  
10 coordination has occurred; correct?

11 A. If you just say coordination, I'm -- yes.

12 Q. Dr. Hill, you mentioned in your direct testimony that  
13 you've testified a number of times on behalf of both the  
14 government and private parties in merger litigation; right?

15 A. That's true.

16 Q. In four of the five cases in which you testified you  
17 actually did analyze whether the industry at issue in those  
18 litigations was susceptible to coordination; correct?

19 MR. GELFAND: Objection. Relevance.

20 THE COURT: Yeah, why is that relevant here? He  
21 hasn't offered an opinion here.

22 MR. THORNBURGH: Your Honor, I'm trying to probe  
23 the fact as to why he hasn't offered an opinion here where  
24 he has in almost all of the other merger cases in which he  
25 testified.

1 THE COURT: Why don't you ask him that?

2 THE WITNESS: Sure. So the reason is, here my  
3 analysis of coordinated effects is we have a maverick firm  
4 in this industry. It's going to grow larger and it's going  
5 to be able to compete on more routes and disrupt any  
6 coordination should it occur. So I really haven't focused  
7 on whether or not there are the other two conditions.

8 THE COURT: So part, as I get your answer, you're  
9 accepting that, based on your analysis, that JetBlue is,  
10 quote, a maverick firm?

11 THE WITNESS: That's correct, your Honor.

12 THE COURT: All right. Go ahead.

13 Q. Dr. Hill, you agree that an industry can have more than  
14 one maverick; correct?

15 A. That could be true, yes.

16 Q. You agree that Spirit is a disruptive force today;  
17 correct?

18 A. Correct.

19 Q. You also agree that Spirit lowers the risk of  
20 coordination in the markets where it competes today;  
21 correct?

22 A. I think that's fair.

23 Q. You would also agree that a firm's incentives help  
24 determine how it competes; correct?

25 A. That's fair.

1 Q. It's possible for a merger to change a firm's  
2 incentives; right?

3 A. Correct.

4 Q. So it's possible that this transaction could change  
5 JetBlue's incentives such that it is no longer as disruptive  
6 as it is today; correct, Dr. Hill?

7 A. It's possible, but I don't think it's likely.

8 Q. Dr. Hill, you didn't do any quantitative analysis in  
9 your report to determine the likelihood that JetBlue's  
10 incentives would remain the same after this transaction is  
11 completed; correct?

12 A. That's correct.

13 Q. You've -- you were here for the testimony of Mr. Hayes  
14 when he described JetBlue's need to make JetBlue's loyalty  
15 program stronger; right?

16 A. I heard it. I don't recall it carefully.

17 Q. You also heard Mr. Hayes describe how the transaction  
18 would enable JetBlue to more successfully compete for  
19 corporate contracts; right?

20 A. I believe so.

21 Q. And you also heard the testimony of Mr. Eric Friedman  
22 from JetBlue who testified that the transaction would enable  
23 JetBlue to open up thousands or hundreds of routes that  
24 JetBlue could serve on a connecting basis; right?

25 A. Correct.

1 Q. Dr. Hill, United, Southwest, American and Delta, they  
2 all focus a lot on loyalty, competing for corporate  
3 contracts, and operating lots of connecting itineraries,  
4 wouldn't you agree, sir?

5 A. I think that's fair.

6 Q. So if this merger does occur and JetBlue places an  
7 increased focus on those three factors, isn't it conceivable  
8 that JetBlue's incentives to act as a maverick could change?

9 A. I already agreed. It's possible it could change. I  
10 just don't think it's likely, given the evidence.

11 (Whereupon counsel conferred.)

12 MR. THORNBURGH: No further questions at this  
13 time, your Honor.

14 THE COURT: Now, it's time to stop and we're going  
15 to stop, but let me ask, and I'll give you, obviously, the  
16 time for redirect. Are we done then with evidence? I'm  
17 turning to the defense.

18 MR. SHORES: No, your Honor. We will have a  
19 third-party witness tomorrow, followed by one additional  
20 expert, and then possibly one more third-party.

21 THE COURT: So we'll go as you expected, through  
22 tomorrow.

23 MR. SHORES: We will go through tomorrow.

24 THE COURT: And probably into Friday?

25 MR. SHORES: Not Friday, but into Thursday. I



1 believe we previously talked about not having court on  
2 Friday.

3 THE COURT: I appreciate your correcting me. So  
4 the schedule that we have discussed is the schedule, and I  
5 thank you.

6 All right. We'll recess. You may step down, sir.

7 (Whereupon the witness stepped down.)

8 THE COURT: We'll start promptly at 9:00 a.m.  
9 tomorrow morning. The total elapsed time is plaintiff,  
10 eight days, three hours, ten minutes. Defense, five days,  
11 one hour, forty minutes.

12 We'll stand in recess until 9:00 a.m. tomorrow  
13 morning. We'll recess.

14 THE CLERK: All rise.

15  
16 (Proceedings adjourned.)  
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C E R T I F I C A T E

I, Cheryl B. Palanchian, Court Reporter  
for the United States District Court for the  
District of Massachusetts, do hereby certify that  
the foregoing pages are a true and accurate  
transcription of my shorthand notes taken in the  
aforementioned matter to the best of my skill and  
ability.

/s/ Cheryl B. Palanchian 11/27/2023  
CHERYL B. PALANCHIAN

Registered Merit Reporter  
Certified Realtime Reporter